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IN THE SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1993

BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH and BLACK HILLS MUSEUM OF NATURAL HISTORY FOUNDATION, INC.,

PETITIONERS

vs.

THE UNITED STATES OF AMERICA DEPARTMENT OF JUSTICE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court err when it held that the United States need not provide a putative owner of personal property with due process of law when it initially seizes property as evidence in a criminal case, abandons the criminal action involving that property, and subsequently deprives the putative property owner of all interest whatsoever in the seized property?

2. Did the Circuit Court err when it found that the United States trust obligation concerning "Indian lands" extended to otherwise unregulated personal property such as fossils found partially imbedded in lands which a competent Indian has conveyed to the United States to hold in trust for the Indian's benefit?

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JURISDICTION OF THE SUPREME COURT

The statutory provision on which the jurisdiction of this Court is invoked is 28 U.S.C. § 1254(1). Petitioners[1] pray that a writ of certiorari issue to review the judgment of United States Court of Appeals for the Eighth Circuit filed December 15, 1993, and reported as Black Hills Institute of Geological Research, Inc. v. United States Dept. of Justice, 12

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[1]The corporation petitioner has no parent corporation or subsidiaries.

F.3d 737 (8th Cir. 1993). Petitioners filed a timely Petition for Rehearing with Suggestions for Rehearing En Banc. The Eighth circuit denied that request in an order dated February 2, 1994.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. V. No person shall be . . . deprived of . . . property, without due process of law.

25 U.S.C. § 348. Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made. . ..

25 U.S.C. § 464. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized thereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or form which the share were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance

with the then existing laws of the State or Federal laws where applicable, in which said lands are located or in which the subject-matter of the corporation is located, to any member of such tribe or of such corporation or any heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust; . . ..

25 U.S.C. § 483. The Secretary of Interior, or his duly authorized representative, is hereby authorized in discretion, and upon application of the Indian owners, to issue patents in fee, remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under the provisions of the Act of June 18, 1934, or the Act of June 26, 1936.

STATEMENT OF THE CASE

On May 14, 1992, federal personnel surrounded the Black Hills Institute of Geological Research in Hill City, South Dakota. Their mission was to seize ten tons of bones and matrix which together made up the largest and best-preserved Tyrannosaurus rex fossil ever discovered. Shortly before the seizure, the acting United States Attorney told counsel for the Institute that no seizure would take place. The National Guard, mobilized for the seizure, moved the fossil by truck to the School of Mines & Technology in Rapid City, South Dakota. Federal personnel were acting pursuant to a search warrant supported by affidavits which stated that the fossil was evidence of violations of the Antiquities Act, theft of government property, or theft of tribal property. After the seizure, the United States

Attorney explained to counsel that his lack of candor was necessary to preserve the integrity of the operation.

The Institute immediately brought an action for return of the fossil because it was concerned the conditions under which the fossil was stored would irreparably damage the specimen. The district court denied the Institute's request for injunctive relief, and a panel of the Eighth Circuit Court of Appeals reversed the decision. Black Hills of Geological Research v. United States, 967 F.2d 1237 (8th Cir. 1992) (Black Hills I.) On remand and after an evidentiary hearing, the Eighth Circuit Court of Appeals affirmed the district court's decision to leave the rex in dead storage in a steel container in a garage, where it still sits today. Black Hills Institute of Geological Research v. United States Dept.

of Justice, 978 F.2d 1043 (8th Cir. 1992) (Black Hills II.)

The seizure triggered worldwide interest in the case. Once it was seized, all paleontological research on the fossil came to a halt, including a CAT-SCAN of the fossil at NASA, and there has been no more scientific study of this specimen.

The procedural history in this case forms much of the factual background necessary to appreciate the legal issues involved. In response to the Institute's assertion that it purchased the rex for $5,000 from the landowner for whom the government held the land in trust, the government took the position that it owned the rex under the Antiquities Act or, in the alternative, that the sale of the rex was void because it took place without the approval of the Department of the Interior. These mutually exclusive

positions placed the government in the posture of claiming ownership of property which it also asserted it held in trust.

The government's Antiquities Act claim was based on a 1956 Solicitor's Opinion that the Act applied to fossils. However, this claim was withdrawn after it was pointed out that the 1956 Opinion had been reversed by two later Opinions.

Maurice Williams, the landowner, moved to file an amicus brief in the case in which he wanted to assert his ownership claim of the fossil. The district court denied that motion, finding that Williams' interest in the fossil was "adequately protected by the United States." The court did, however, allow him 20 days to intervene, if he so desired.

The Department of Justice never explained why the fossil was needed as evidence in a criminal case. The

Department of the Interior (which had notice of these proceedings) never moved to intervene in the case to assert any wrongful nature of the transaction between the Institute and Williams or to set it aside. No forfeiture action was ever filed. Indeed, no indictment or information has yet been filed concerning the transaction between Williams and the Institute.

On July 31, 1992, the Institute filed its second amended complaint. The only issue raised by the second amended complaint was whether the Institute's claim to the fossil, based upon their purchase of it from Williams, was superior to the government's purported need for the fossil as evidence in some yet to be filed criminal action. The government filed no answer, counterclaim, or separate pleading claiming any interest in the fossil.

In cross-motions for summary judgment, both the Institute and the government relied on the court's anomalous jurisdiction as a basis for the action. However, the district court was not satisfied that it had jurisdiction and ordered further briefing on the subject, noting:

> The Court, in the preliminary consideration of the summary judgment motions filed, addresses the issue of jurisdiction. Neither party has provided this Court with authority which would support jurisdiction. The Court calls counsels' attention to 28 U.S.C. § 2409a(a).

Again, both parties asserted that the action was based on the court's anomalous jurisdiction. Moreover, the government noted that if the Institute's anomalous jurisdiction argument failed, then there was no jurisdiction in the district court.

The district court's decision, stripped to its bare bones, was "that the

tyrannosaurus rex fossil embedded in Maurice Williams' land is held by the United States under the rights set forth in the trust patent deed dated September 23, 1969." Indeed, the district court's order denying the Institute's motion for reconsideration cautions that it "is incorrect" to assert that the "government owns" fossils on trust lands.

Thus, on February 11, 1993, the trial court held the basis for the seizure on May 14, 1992, to be without merit. By that time the government had withdrawn its contention that the Institute had violated the Antiquities Act, and the district court had concluded that neither the United States nor the tribe owned the fossil. Thus, there was no need for the fossil as evidence in a criminal case, and the district court should have ordered the return of the fossil to the Institute.

The issue before the district court was which party, the Institute or the Department of Justice, had a superior possessory claim. The district court sua sponte converted the Institute's asserted basis of anomalous jurisdiction to federal question jurisdiction and concluded that it "must therefore decide the issue of ownership." After recasting the jurisdictional basis of the Institute's claim and the relief sought in the action, the district court concluded that the "ownership" claim of the government was superior to that of the Institute and awarded "permanent possession" of the fossil to the Department of Justice. The Eighth Circuit Court of Appeals affirmed the decision and concluded the Institute had no right to due process that was violated by the government's action, and summarily concluded that the fossil, in

its natural state, comprised the principal value of the land on which it was found. Black Hills Institute of Geological Research v. United States Dept. of Justice, 12 F.3d 737 (8th Cir. 1993)(Black Hills III.)

The Institute applied for rehearing and offered suggestions for rehearing en banc because it believed the panel's opinion is contrary to the rule recently announced in United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993). In Good, a forfeiture case under 21 U.S.C. § 881(a)(7), the Supreme Court held that where the Government seizes property, not to preserve evidence of criminal wrongdoing but to assert ownership and control over the property, its action must comply with the Due Process Clause.

Moreover, the Eighth Circuit's decision extends the Department of

Interior's trust obligation far beyond that contemplated by Congress and is not within the rules announced in Starr v. Campbell, 208 U.S. 527 (1908), and United States v. Paine Lumber, 206 U.S. 467 (1907), because there is no record evidence of the value of Williams' land or of the fossil when initially discovered. Had the Institute known of this claim, it would have introduced evidence that undiscovered fossils in the earth are practically worthless. The value of such a fossil is only realized upon restoration and curation. On February 2, 1994, the Eighth Circuit denied rehearing and rehearing en banc, but modified its opinion in an effort to distinguish the Good decision. Black Hills Institute of Geological Research v. United States Dept. of Justice, No. 93-1602 slip op. (8th Cir., Feb. 2, 1994) (Black Hills IV.)

ARGUMENT

I. SEIZURE OF THE FOSSIL VIOLATED THE DUE PROCESS CLAUSE BECAUSE NO EXTRAORDINARY CIRCUMSTANCES EXISTED TO PERMIT THE SEIZURE WITHOUT NOTICE AND HEARING.

A. Due Process Normally Requires Notice and Opportunity to be Heard Before a Significant Property Deprivation Occurs.

The Due Process Clause of the Fifth Amendment requires that a property owner be given notice and an opportunity to be heard before the government seizures property, unless extraordinary circumstances exist which allow the government to postpone notice and a hearing. Fuentes v. Shevin, 407 U.S. 67, 90-91 (1972). As the United States Supreme Court recently noted:

> The right to prior notice and a hearing is central to the Constitution's command of due process. 'The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property

> from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property.'

United States v. Good, 114 S. Ct. 500-501 (quoting Fuentes v. Shevin, 407 U.S. at 80-81.)

It is undisputed that the Institute had no notice and no pre-deprivation hearing in this case. The fossil was initially seized based on an ex parte application for a search warrant as part of a criminal investigation into acts which the then acting United States Attorney knew could not be crimes. It was only after the government abandoned the allegations of criminal conduct that the district court concluded the seizure was effected as part of the trust obligation which the United States owes Maurice Williams. Even then the Institute had no notice of the basis of the ultimate disposition of the fossil because the

district court, not the Department of Justice, crafted that post hoc rationale to justify the seizure. Good requires pre-deprivation notice. The Institute did not even receive effective post deprivation notice.

The fundamental requirement of due process is the opportunity to be heard at a 'meaningful time in a meaningful manner.' Mathews v. Eldridge, 424 U.S. 319, 333 (1976). This means a hearing before the property is taken away--even temporarily. The United States Supreme Court recently emphasized that point, noting: "Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." United

States v. Good, 114 S.Ct. at 502 (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring) (footnotes omitted)).

B. No Extraordinary Circumstances were Present to Allow the Government to Avoid a Hearing.

A narrow exception exists to the requirement for a pre-seizure hearing. The Supreme Court has held such a hearing may be postponed under "extraordinary circumstances" which are "truly unusual." Fuentes v. Shevin, 407 U.S. at 90. The panel, in Black Hills I, determined the government had no need to retain the fossil as evidence in any criminal case, noting:

> The government does not need to retain as evidence the fossil which the government itself described as 'priceless' in order to preserve evidence in a petty misdemeanor criminal prosecution. The presence of the evidence is conclusive and

> well-documented. No one would seriously suspect that the Foundation intends to destroy the fossil. But even if the fossil was lost or destroyed, it would have no impact on any criminal investigation. The government may take whatever steps necessary to establish proof of the evidence before returning it. Moreover, the district court could impose stringent conditions on the care and preservation of the fossil, including the requirement that it be available as evidence in the criminal trial.

Black Hills I, 967 F.2d at 1241.[2]

Moreover, there are no extraordinary circumstances surrounding the government's newly embraced role as Williams' trustee which would obviate the need for a pre-deprivation hearing. Historically, seizures without notice and an opportunity to be heard are condoned only where each of three specific elements have been met:

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[2]Although indictments have been returned against the Institute and its principals, no indictment was returned concerning the fossil at issue in this case.

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Fuentes, 407 U.S. at 91. No record evidence is available to satisfy any of these elements. The only governmental interest at stake in this case is its role under the deed of trust to Maurice Williams. While that interest may be important to Williams, it is considerably outside the circumscribed trust relationship described in United States v. Mitchell, 445 U.S. 535 (1980) (Mitchell I), and United States v. Mitchell, 463 U.S. 206 (1983) (Mitchell II). In any event, the governmental interest at stake

does not appear to be "a special need for very prompt action" so as to obviate the need for a pre-deprivation hearing.

Moreover, the government cannot satisfy the third prong of the Fuentes test. There simply are "no standards of a narrowly drawn statute" at issue in this case. Instead, there is the somewhat amorphous concept of the trust relationship between the United States and an individual Indian. The official within the United States responsible for that relationship is the Secretary of the Interior, not the United States Attorney for South Dakota. There is no evidence in this record that the Secretary of Interior determined that it was necessary to seize the fossil without notice and hearing in furtherance of whatever trust duties the United States owes Maurice Williams. Thus, there were simply no extraordinary

circumstances surrounding the seizure of the fossil that obviate the need for a pre-deprivation hearing.

C. United States v. Good Commands that an Adversary Hearing be Conducted Prior to the Seizure.

"The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making." United States v. Good, 114 S. Ct. at 502. Additionally the Supreme Court noted

> [T]he availability of a postseizure hearing may be no recompense for losses caused by erroneous seizure. Given the congested civil dockets in federal courts, a claimant may not receive an adversary hearing until many months after the seizure. And even if the ultimate decision is that the claimant was an innocent owner, or that the Government lacked probable cause, this determination, coming months after the seizure, 'would not cure the temporary deprivation that an earlier hearing might have prevented.'

Id. (Citations omitted.)

In Mathews v. Eldridge, the Court announced a three-part balancing test for cases where claims are made that seizures, in the absence of a pre-deprivation hearing, violate due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id., 424 U.S. at 335.

1. The Private Interest. The Institute has a wide variety of interests that were adversely affected by the government's action. First of all, there was the Institute's interest in the fossil itself. The panel, in Black Hills I, noted that the Institute has "an interest

in preserving the fossil and studying it." 967 F.2d at 1239. That interest was sufficient to support the Institute's claim for the return of the fossil based on the federal court's "anomalous jurisdiction." Id. at 1240.

The Institute has other interests in the fossil. In Good, the United States Supreme Court noted that the government's seizure of Good's home deprived him of "valuable rights of ownership, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents. All that the seizure left him, by the Government's own submission, was the right to bring a claim for the return of title at some unscheduled future hearing." United States v. Good, 114 S. Ct. at 501. Although the Institute had donated the fossil to the Foundation, and there was no

suggestion of sale, the Institute was nonetheless deprived of the same interests which Good lost. In this case, there is no statutory claim procedure which the Institute could invoke to seek the return of the property. Moreover, the only procedures open to the Institute to seek return of the fossil were an action under F. R. Crim. P. 41(e) and the instant claim based on anomalous jurisdiction. Neither procedure is an adequate substitute for a pre-deprivation hearing in which the Institute would not be forced to guess the reasons why the government claimed the fossil.

The Institute has yet another interest in the fossil. That interest is the claim in quantum meruit for the value of the services the Institute has thus far rendered in restoring the fossil. Uncontradicted evidence shows the

Institute has devoted more than 5,000 hours to restoring the fossil and has spent over $100,000 in the process. The way the government seized the fossil has deprived the Institute of a forum in which to assert that claim.

2. Risk of Erroneous Deprivation. In United States v. Good, the Supreme Court noted that the "ex parte preseizure proceeding affords little or no protection to the innocent owner. In issuing a warrant of seizure, the magistrate judge need determine only that there is probable cause to believe that the real property was 'used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of' a felony narcotics offense." 114 S. Ct. at 502. However, the procedures in forfeiture actions afforded Good more notice than the Institute had here.

In this case, the Institute was led to believe that the fossil was seized as part of a criminal investigation. When it appeared that the Institute might recover the fossil during the pendency of that investigation, the district court, and not the appellee, changed the basis on which the fossil was seized, altered the basis of jurisdiction in the district court, and stripped the Institute of its interest in the fossil. This was done without requiring the Department of Justice to answer the Institute's complaint and disclose the basis of its claim to the fossil.

Moreover, even in the post-seizure proceeding, the Institute was left without a clue of the basis on which possession was awarded to the Department of Justice until the district court announced its decision. In fact, after Black Hills II

was decided, the district court allowed the Institute an opportunity for discovery. Yet when the Institute tried to take advantage of that opportunity, the district court quashed the subpoenas served on the government officials who participated in the seizure and issued a protective order relieving the Department of Justice from the obligation of answering the Institute's written discovery.

Finally, the post-deprivation procedure deprived the Institute of the opportunity to cross-examine Maurice William and develop his version of the facts. The United States Supreme Court has held that the practice of ex parte seizure creates an unacceptable risk of error. United States v. Good, 114 S. Ct. at 502. Moreover, the Court noted, in the contest of the forfeiture statute, that

> Fairness can rarely be obtained by secret, one-sided determination of fact decisive of rights.... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Id., citing Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring) (footnotes omitted).

Compared to the procedures employed in this case, the due process rights enjoyed by Good are a model of fair play. Here, the Institute had no notice of the nature of the claims against its property until the very decision that stripped it of those rights. In light of the Supreme Court's decision in Good, it is simply wrong to hold that the Institute received all the process that it was due in this proceeding.

3. The Government's Interest. In Good, the United States Supreme Court also considered the nature of "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 114 S. Ct. at 501, quoting Mathews v. Eldridge, 424 U.S. at 355. The Court noted:

> The governmental interest we consider here is not some general interest in forfeiting property but the specific interest in seizing real property before the forfeiture hearing. The question in the civil forfeiture context is whether ex parte seizure is justified by a pressing need for prompt action.

Id. (citations omitted.)

As noted above, the panel, in Black Hills I, concluded that the seizure of the property was not necessary to retain the fossil as evidence. 967 F.2d at 1240.

Moreover, the panel found that "the government's rationale for the seizure was inadequate." Id. at 1239. If there were not exigent circumstances that warranted seizure of the fossil as evidence, then there certainly could not be extraordinary circumstances that would tolerate seizure of the fossil without notice and an opportunity to be heard as part of the trust responsibilities the United States owes to Maurice Williams.

Implicit in the panel's finding on the need for the fossil as evidence is a conclusion that the ten-ton fossil was unlikely to flee the jurisdiction or that the seizure was necessary to establish the district court's jurisdiction. Thus, this case is markedly different from Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). There the Supreme Court found that immediate seizure was necessary

to prevent the disappearance of a yacht and establish the court's jurisdiction. Id. at 679.

Moreover, the fiscal and administrative burdens of holding a pre-deprivation hearing in this case would have been far less than the burden caused by seizure. As the panel noted in Black Hills I, "[t]he federal government enlisted dozens of Federal Bureau of Investigation agents, Park Rangers, and members of the South Dakota National Guard in an early morning raid to seize 10 tons of dinosaur bones." 967 F.2d at 1239. A pre-deprivation hearing would have obviated the need to mobilize the National Guard and likely would have been a far more cost-effective, if not less dramatic way to handle the situation. As the Court noted in Good, "[r]equiring the Government to postpone seizure until after an

adversary hearing creates no significant administrative expense." 114 S. Ct. at 504. When compared to the extraordinary expense the government incurred to effect the ex parte seizure in this case, it is clear that a pre-deprivation hearing would not only afford the Institute its rights under the Fifth and Fourteenth Amendments, but would have posed a far smaller burden on the government as well.

Good established beyond all doubt that an ex parte seizure of property can violate an individual's right to due process of law. If anything, the seizure in this case was more egregious than the seizure involved in Good. Yet, in contradiction of Good, the Eighth Circuit's opinion suggests that such an ex parte seizure is appropriate because the United States is acting in its capacity as a trustee for an individual Indian.

II. NO REGULATIONS GOVERNING PERSONAL PROPERTY PROVIDE SUPPORT FOR THE UNITED STATES' SEIZURE OF THE FOSSIL.

In support of its argument that the fossil was regulated personal property and therefore subject to seizure, the government urged that the fossil is an "object of antiquity" under the Antiquities Act. In fact, the government suggested: "There exists 86 years of consistent legal precedent which addresses the issue directly." The primary authority for this assertion was a 1956 memorandum from the Assistant Solicitor, National Parks, concerning the Antiquities Act.

A. Solicitor's Opinions.

In 1956 the Department of the Interior, acting through the Assistant Solicitor for National Parks, issued an opinion addressing the scope of the Antiquities Act. In suggesting that this

opinion supported the view that the Antiquities Act applies to fossils, the government stated:

> The 1956 memorandum was written in response to a brief submitted to the Department of the Interior by the American Geological Institute challenging the Department's regulation of fossil removal from federal land based on the Antiquities Act.

However, the government failed to reveal that the 1956 Assistant Solicitor's Opinion was reversed by two later Solicitor's Opinions, in 1977 and 1986. These subsequent opinions represent the current position of the Department of the Interior and unequivocally state that paleontological specimens are excluded from the Antiquities Act. As final agency positions, these opinions are entitled to the same deference as any other final agency action.

The Tenth Circuit has noted: "The administrative interpretation [contained

in the Solicitor's Opinions] need only be a reasonable one to be accepted, even though there may be another equally reasonable interpretation." Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 745 (10th Cir. 1982).[3] See also Utah v. Andrus, 486 F. Supp. 995, 1004 (D. Utah 1979) ("Generally, the interpretation of a statute by those charged with its execution is entitled to great deference. The court can find no reason not to give such deference in this case." (Citations omitted.)).

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[3]In fact, the Tenth Circuit, in the Rocky Mountain Oil & Gas case, reversed the district court for failing to give proper deference to the Solicitor's Opinions' interpretation of an applicable statute, holding "that Interior's interpretation of the section's effect on mineral leasing activities, as expressed in the Solicitor's Opinion of September 5, 1978, is reasonable and entitled to deference. Indeed, under our analysis it is compelling." Id. at 750.

The government referred to the 1977 Solicitor's Opinion before the district court, but failed to note that the Department of the Interior's position now excludes fossils from the Antiquities Act. The 1977 opinion reversed the 1956 Solicitor's Opinion, noting:

> Taking into consideration the long standing views of this office and the recent court decisions, we must advise that the courts could very likely interpret the Antiquities Act as not including paleontological specimens.

Furthermore, the 1977 Solicitor's Opinion notes:

> Based on the foregoing considerations, our advice must be that it would be the more appropriate to adopt a legal strategy which excludes paleontological objects from the Antiquities Act . . . .

A Solicitor's Opinion, adopted by the applicable agency, constitutes final agency action. See Rocky Mountain Oil &

Gas, 696 F.2d at 741.[4] As such, the opinion, like any final agency action, is entitled to deference by the reviewing court in its interpretation of applicable statutes. See South Dakota v. C.A.B., 740 F.2d 619, 621 (8th Cir. 1984); Brotherhood of Ry. & Airline Clerks v. Burlington N., 722 F.2d 380, 381 (8th Cir. 1984).

Nine years after the 1977 Solicitor's Opinion, the Department of the Interior issued a second opinion which limited the Antiquities Act to archaeology. The 1986 Solicitor's Opinion stated:

> the legislative history [of the Antiquities Act] strongly suggests that the primary concern of Congress was the historical and pre-historical cultural and archaeological heritage of man on this continent, and that the phrase

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[4]"Interior's implementation of this policy amply demonstrates that it has taken a definitive position; its administration of the policy is anything but a matter of speculation." Rocky Mountain Oil & Gas at 741.

> should be given a meaning limiting it to an archaeological context . . ..

(Mem. from Assoc. Solicitor, Energy & Resources, to Director, BLM of 1/17/86 at 6, citing to Mem. from Deputy Solicitor, Energy & Resources, to Assistant Secretary, Fish & Wildlife & Parks of 1/19/77). Thus the Solicitor's Opinion contains no support for the proposition that the fossil constitutes regulated personal property.

B. The National Academy of Sciences (NAS) Report.

The National Academy of Sciences Report mandated by Senator Pressler in 1985 recognized the reversal of the 1956 Solicitor's Opinion. Senator Pressler introduced amendment 1335 to the 1986 Appropriations Bill on December 5, 1985. 131 Cong. Rec. S17,081 (daily ed. December 6, 1985). The amendment passed and moved

over to the house. 131 Cong. Rec. H12,857-58 (daily ed. December 19, 1985) The amendment appeared to prohibit the implementation of final regulations concerning paleontological research until the Secretary received the NAS Report concerning the permitting and post-permitting regulations. H.R.J. Res. 465, Further Continuing Appropriations for Fiscal Year 1986, Rep. No. 450, 99th Cong., 1st Sess. 63 (December 19, 1985).

Senator Pressler recognized that "regulations affecting rock and fossil collectors and their access to federal lands are very unclear." (Letter from Senator Pressler to Larson of 12/17/85.)[5]

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[5]Senator Pressler's office has historically been an active participant in paleontological issues. Published in 1987, the NAS Report begins: "There is no federal legislation designed specifically for protection of fossils on federal public lands, as there is for archeological resources." NAS Report at 216.

Accordingly, Senator Pressler initiated the NAS Report requirement by amendment to the fiscal year 1986 continuing resolution because he wanted to "assure continued access to federal lands" to collectors like Peter Larson. Id.

The NAS Report, entitled "Paleontological Collecting" (National Academy Press, Washington, D.C.), was released in 1987.[6] The report is the

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The footnote to this text indicates that the only legislation designed to effect such regulation "was introduced in 1983 by Senator Pressler (S.D.), but died in the Senate Energy and Natural Resources Committee. See Paleontological Resources Conservation Act of 1983, S.1569, 98th Cong., 1st Sess., 129 Cong. Rec. 93 (1983)." NAS Report at 234, n.1. A similar effort by Senator Baccus of Montana met same fate in 1993.

[6]Secretary of the Interior Donald Hodel wrote: "The NAS report has now been completed and has concluded that fossils do not constitute a resource requiring the degree of management attention initially proposed by the Department. Conceptually, we accept the report's recommendations." (Letter from Hodel to Johnston, Chr., Comm. on Energy & Natural Resources, U.S.

most extensive inquiry concerning the extent to which federal agents should control or restrict fossil collecting on public lands. NAS Report at 1.

The report notes the confusion caused by the 1956 Solicitor's Opinion:

> It is interesting to note that this opinion was apparently issued in response to a brief submitted by the American Geological Institute maintaining that fossils were not intended to be covered by the permitting provisions of the Antiquities Act. Thirty years later, paleontologists are raising the same problems with permitting, in spite of the fact that the Solicitor's Office has reversed itself on interpretation of the Antiquities Act.

NAS Report, App. R, "Legal History & Interpretations," n.13. Thus, the NAS Report, unlike the position taken by the government before the district court, takes the final step of informing the reader that the 1956 Assistant Solicitor's

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Senate of 9/29/87 (emphasis supplied).)

Opinion has been reversed by the Solicitor's Office. Id.

In discussing the 1977 Solicitor's Opinion, the NAS Report states:

> [The advice in the 1977 Solicitor's Opinion] was reiterated by the Solicitor in a more recent opinion, which advised 'that the Antiquities Act not be relied upon as authority for any fossil management administered by BLM.'

Id. at n.14 (citing to Mem. from Assoc. Solicitor, Energy & Resources, to Director, BLM of 1/17/86 at 6). The Antiquities Act, according to the 1977 and 1986 Solicitor's Opinions, does not regulate paleontological specimens such as the fossil at issue in this case. Neither the district court nor the government cited any additional authority for the proposition that fossils are regulated personal property.

III. THE EIGHTH CIRCUIT'S DECISION ERRONEOUSLY EXPANDS THE UNITED STATES' TRUST OBLIGATIONS FOR INDIAN LAND AND CONTRARY TO THE RULE ANNOUNCED IN STARR V. CAMPBELL AND UNITED STATES V. PAINE LUMBER.

Starr v. Campbell, 208 U.S. 527 (1908), and United States v. Paine Lumber, 206 U.S. 467 (1907), are the seminal cases dealing with an Indian's ability to sell timber that is personal property because it has been severed from the land. Just as the panel disposed of Institute's due process argument in a footnote, the panel disposed of Starr and Paine Lumber in a footnote as well:

> The Supreme Court has held that a beneficial owner of Indian trust land could sell timber from his land without violating the restraint on alienation because 'the cutting [w]as incidental to the preparation of [the] land for agricultural uses.' Felix S. Cohen, Handbook of Federal Indian Law, at 539 n. 94 (1982 ed.) (citing United States v. Paine Lumber, 206 U.S. 467, 473-74 (1907)). The Court distinguished Paine, however, in

> Starr. In Starr, the Court found the timber subject to the restraint on alienation because the timber constituted 15/16 of the value of the land and the land was "timber land" unsuitable for farming. 208 U.S. at 534. Holding otherwise, the Court reasoned, would reduce the restraint on alienation to "small consequence." Id. Thus, Paine does not apply here because sue was a valuable part of the land and nothing in the record suggests that she was excavated to clear the land for farming or other similar purposes.

Black Hills III, 12 F.3d at 742, n.4. The panel's analysis of these decisions is flawed because there is no evidence in the record to support the panel's factual determination, and the conclusion that the United States trust obligation reaches so far is utterly without precedent.

A. Paine Lumber Limits a Restraint on Alienation to those Purposes for Which It was Established.

There are perhaps as many different restraints on the alienation of Indian lands as there are Indian tribes.

For example, the restraint at issue in Paine Lumber was based on the "Stockbridge and Munsee treaty of 1856 (11 Stat. at L. 663) and the act of Congress of 1871 (16 Stat. at L. 404, chap. 38)." Paine Lumber, 206 U.S. at 470. The restraint at issue in Starr was based on the Chippewa treaty of September 30, 1854 (10 Stat. at L. 1110) and the act of Congress of February 11, 1901 (31 Stat. at L. 766, chap. 350). Starr, 208 U.S. at 531-32. The Court noted that whatever its source "[t]he restraint upon alienation must not be exaggerated. It does not itself debase the right below a fee simple." Paine Lumber, 206 U.S. at 473. The Court held:

> We cannot extend the restraint upon the alienation of land to a restraint upon the sale of timber consistently with a proper and beneficial use of the land by the Indians, -- a use which can in no way effect any interest of the United States.

Id.

The restraint present in this case is based on Williams' own acts. Williams deeded the land to the United States to hold for him in trust, thereby invoking provisions of 25 U.S.C. § 483. If the Institute had been afforded a meaningful pre-deprivation hearing the Institute believes the evidence would show that the only reason Williams sought the protection of the United States was to exempt his land from state taxation.[7]

Thus, the Eighth Circuit's decision does nothing to further the objective of placing the land in trust. The Eighth Circuit's decision does nothing to protect the Indian land base or keep the land free from state property taxes. As

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[7]The Institute could not develop this evidence during the post-deprivation proceedings because the Institute was without notice of the basis of the Department of Justice's claim and the district court quashed all Institute discovery as a mere fishing expedition.

in Paine Lumber, no interest of the United States is served by restricting William's ability to sell the fossil.[8]

Moreover, the Institute's position with regard to the continued viability of the Paine Lumber decision is also consistent with that of the United States. In 1942 the Acting Solicitor for the Department of the Interior, Felix S. Cohen, opined

> While the decision of the Supreme Court in the Paine Lumber Co. case was limited by its subsequent holding in Starr v. Campbell, where the Court held that a statutory

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[8]The panel decision may have far-reaching effects. It is common practice in South Dakota for Indians to sell gravel from their land. Gravel, according to the panel's opinion, is the solid matter of the earth before severance. Therefore, after severance, 25 U.S.C § 483 would prohibit its sale and subject those who buy it to forfeiture without any pre-deprivation notice or opportunity to be heard. Once again, the manner in which the case was decided denied the Institute the opportunity to present this kind of evidence to the district court.

> restriction upon alienation extended to timber upon lands valuable only for lumbering, and although the sale of timber on Indian allotments was later, by express legislation, placed under the control of the Secretary of the Interior, the principles set forth by the Supreme Court in the Paine Lumber Co. case have never been overruled and remain valid.
>
> It is true that statement may be found in a number of court opinions which refer to general supervisory powers exercised by the Department of the Interior over Indian affairs; but it will be found that in each case where such language appears that there is some specific statutory authorization for departmental action and the general statutes discussed above are invoked only for the purpose of filing in gaps of detail on which those statutes are silent. On the other hand, actions which this Department purported to justify on the basis of "general supervisory powers" have been repeatedly condemned by the Federal courts as unauthorized and unlawful.

The assertion that 25 U.S.C. § 481 prohibits the sale of otherwise unregulated personal property that does

not constitute a major portion of the value of the land is similar, if not identical, to the assertion of a "general supervisory power" over the Indian land. If there is no specific statutory authority for the Department's conduct, then that conduct is unauthorized and unlawful.

B. No Evidence Supports the Panel's Finding that "Sue was a Valuable Part of the Land" within the Meaning of Starr v. Campbell.

The Institute concedes that a timber sale was voided in Starr v. Campbell because the value of the timber constituted 15/16 of the value of the tract at issue. 208 U.S. at 533. The rule in Starr cannot, however, be fairly applied to this case because there is no record evidence of value of the land at issue, or that removal of the fossil diminished the value of Williams' land.

Fossils are fundamentally different from timber because fossils only acquire significant value through the costly and laborious process of restoration and curation. The record showed that at the time of the seizure the Institute had invested $100,000 and over 5000 hours in the restoration process. Many times that amount of time and money must be invested to give the fossil any significant value.

Moreover, fossils are unlike other natural resources found on Indian lands such as timber, oil and gas, or locatable minerals in another significant way. Unlike the other resources, the limited value of unrestored fossils exposed to the elements decreases at an increasing rate. Once a fossil is exposed to the elements, it will deteriorate to the point where it is of no value whatsoever unless it is restored and curated.

Once again, the manner in which the seizure was conducted, with no pre-deprivation hearing and no meaningful post-deprivation hearing, prevented the Institute from the opportunity to present expert testimony about the value of the fossil, both in the ground and as restored, as well as the value of land from which it was removed and the uses to which that land could be put. In the absence of that evidence, reliance upon Starr v. Campbell is misplaced and the rule in Paine Lumber is controlling.

REASONS FOR GRANTING CERTIORARI

The egregious manner in which the fossil was seized and the Institute deprived of its interest in it is reason enough to grant certiorari. However even more compelling reasons exist to accept this case. The impact of this decision is far reaching. Indeed, the case extends to

every child who picks up a pebble while vacationing in a national park or forest.

The extent to which fossils found on federal land are regulated, if at all, is a question of first impression for the courts. Implicit in the decision to regulate, or not to regulate fossils are a wide variety of policy issues. Those issues touch the need to preserve the specimen, the need to control unscrupulous collectors, tribal sovereignty, and a more fundamental question of whether in the absence of specific legislation the courts should play any role at all.

Currently these decisions are being made on a piece meal basis by the supervisor of each national forest or national park, the United States Attorney in each district in which Indian lands are located, or the person charged with management responsibility for each

individual tract of land subject to federal control. Given the wide variety of managers and the differing political and social agendas that these individuals bring to their work, the lack of uniformity is staggering. By granting certiorari in this case the Court can provide uniformity where there currently is none. Moreover, the Court can right a grievous wrong done to the Institute and to all those who believe in the rule of law.

Dated this 11 day of May, 1994.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS

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APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CIV. NO. 92-5070

BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH; and BLACK HILLS MUSEUM OF NATURAL HISTORY FOUNDATIONS, INC., a nonprofit corporation,	)
Plaintiffs,	)
vs.	)
THE UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE,	)
Defendant.	)

MEMORANDUM OPINION

NATURE AND PROCEDURAL HISTORY

This matter comes before the Court on cross motions for summary judgment filed pursuant to Fed. R. Civ. P. 56.

The case has had a somewhat convoluted and checkered past. It has

resulted in two decisions[1] of the Eighth Circuit Court of Appeals involving motions for possession of the tyrannosaurus rex skeleton known by the nickname "Sue."

RELEVANT FACTS

The facts upon which this Court,s decision will be based are simple and straightforward. They are as follows:

1. The parties are disputing possession and ownership of a fossilized skeleton of a tyrannosaurus rex dinosaur approximately 65 million years old.

2. The fossil was taken from Indian trust land within the exterior boundaries of the Cheyenne River Sioux Tribe Reservation of South Dakota. The legal description of the land from which the

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[1]Black Hills Institute of Geological Research v. United States Dept. of Justice, 967 F.2d 1237 (8th Cir. 1992) (Black Hills I); Black Hills Institute of Geological Research v. United States Dept. of Justice, 978 F.2d 1043 (8th Cir. 1992) (Black Hills II).

fossil was taken is Section 32, Township 15 North, Range 18 East, Ziebach County, South Dakota.

3. Legal title to the land is held by the United States in trust status for Maurice A. Williams, an Indian. The instrument creating the trust status was a trust patent deed dated September 23, 1969. It is set forth fully as follows:

340 22652

THE UNITED STATES OF AMERICA

To all to whom these presents shall come, Greeting.

WHEREAS, an Order of the authorized officer of the Bureau of Indian Affairs is now deposited in the Bureau of Land Management, directing that, pursuant to the Act of June 18, 1934 (48 Stat. 984), a trust patent issue to Maurice A. Williams, a Cheyenne River Indian, for the following described land:

Black Hills Meridian, South Dakota

T. 14 N., R. 18 E.,
Sec. 4, Lots 1, 2, 3, and 4, S½N½, and SW¼;
Sec. 5, Lot 1;
Sec. 21, NE¼

T. 15 N., R. 18 E.,
Sec. 32, All;
Sec. 33, All.

The area described contains 1,959.05 acres.

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, hereby declares that it does and will hold the land above described (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and at the expiration of said period the United States will convey the same by patent to the said Indian in fee, discharged of said trust and free from all charge and encumbrance whatsoever; but in the event said Indian dies before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said land, or cause said land to be sold for the benefit of said heirs as provided by law.

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476) has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

GIVEN under my hand, in Billings, Montana, the TWENTY-THIRD day of SEPTEMBER in the year of our Lord one thousand nine hundred

and SIXTY-NINE and of the Independence of the United States the one hundred and NINETY-FOURTH.

By /s/ Eugene H. Newell
Manager, Montana Land Office.

Patent Number 40-70-0051

The instrument provides that the United States is to hold the land for a period of twenty-five years in trust for the sole use and benefit of Maurice A. Williams, and at the expiration of said period, the United States would convey the same by patent to Maurice A. Williams or his heirs in fee. The tract became known in the Bureau of Indian Affairs records as 340 (reservation number) 6309 (tract number). The document is a "trust patent"

document.[2] The trust status will expire on September 23, 1994.

4. The fossil was discovered on August 12, 1990, by employees of plaintiff Black Hills Institute of Geological Research (BHIGR). It was observed with portions of the fossil protruding from beneath the surface. Excavation of the fossil was commenced by BHIGR on August 14, 1990, with the removal completed on September 1, 1990.

5. On August 27, 1990, BHIGR issued a check to Maurice Williams for $5,000, alleging that it was "for title to the fossil and the right to excavate the fossil from his land."

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[2]The land index of the Bureau of Indian Affairs listed "trust patent" as a type of document referring to this instrument and distinguished it from other types of documents such as restricted fee patent, deed to nontrust status, deed to restricted status, deed to trust status, fee patent, mortgages, lease, and other BIA designations.

6. BHIGR removed the fossil without the knowledge or consent of the agencies of the United States. No permit or other permission was obtained from the United States Department of Interior or other governmental agency for either the excavation or the removal of the fossil.

ISSUE

The ultimate issue is whether BHIGR obtained ownership to the fossil while the land from which it was excavated was held by the United States in its trust capacity.

DISCUSSION

I

COURT'S JURISDICTION

The Court sua sponte raised the issue of its jurisdiction[3] to determine

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[3]The Court has previous exercised its general equity jurisdiction known as "anomalous jurisdiction" to determine a temporary custodian for the dinosaur bones pending final disposition on the main

ownership of the fossil based upon the changing posture of the pleadings. The complaint filed May 22, 1992, sought to quiet title to the fossil under 28 U.S.C. § 2409a(a) (Quiet Title Act).[4] The Black

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action to determine ownership. Black Hills I at 1239. The fossil now rests temporarily at the South Dakota School of Mines and Technology. Black Hills II at 1044.

[4] **§ 2409a Real property quiet title actions**

> (a) The United States may be named as a party defendant in a civil action under this section to abjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. **This section does not apply to trust or restricted Indian lands**, not does it apply to or affect actions which may or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July, 10, 1952, (43 U.S.C. 666).

(Emphasis added.)

Hills Museum of Natural History Foundation, Inc., a nonprofit corporation (created by the officers of BHIGR), was added as party plaintiff on May 26, 1992. Following the decision in Black Hills I on June 26, 1992, (finding the Court has anomalous jurisdiction to determine temporary custody), plaintiffs on July 31, 1992, filed a second amended complaint urging the Court to exercise this general equitable jurisdiction and its federal question jurisdiction (28 U.S.C. § 1331).[5]

While the complaint did not cite this statute, it appeared that it was the only statutory basis for an action to quiet title in federal court. The statute by its very terms did not apply to trust or restricted Indian lands. This appears to be why plaintiffs abandoned this ground as supporting jurisdiction.

[5]28 U.S.C. § 1331 provides that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

The Court ordered the parties to submit an appropriate memorandum of law addressing the applicability of 28 U.S.C. § 2409a(a) and the cases of Carlson v. Tulalip Tribes of Washington, 510 F.2d 1337 (9th Cir. 1975) and State of Florida, Dep't of Business Regulation v. United States Dep't of Interior, 768 F.2d 1248, 1254 (11th Cir. 1985).

In their memorandum of law, plaintiffs urge the Court that its "anomalous jurisdiction" which it had in the posture of determining temporary custody should also apply on the issue of permanent ownership. Plaintiffs state, "But Plaintiffs have, with the filing of a second amended complaint, cast this action solely as one for the return of personal property to which Plaintiffs have a superior possessory right to that of the Government." (Docket # 115). Plaintiffs

further urge that "Plaintiffs have not sought a determination under 2409a(a) to quiet title, to the fossil, . . ." By this amendment plaintiffs have abandoned any right of action under that statute.

There is a basic legal difference between exercising anomalous jurisdiction for the purpose of determining temporary custody (as the Court did in Black Hills I) and exercising anomalous jurisdiction for the purpose of determining the permanent possessory or ownership rights to the fossil. A permanent possessory right to the fossil is subsumed within the context of ownership. It is axiomatic that one cannot assert permanent possession as against the rightful owner absent a contract or agreement providing otherwise. The Court must therefore decide the issue of ownership.

This issue involves the application and interpretation of various federal statutes concerning Indian trust lands. It is on this basis that the Court finds it has federal question jurisdiction under 28 U.S.C. § 1331. A nonfrivolous claim of a right or remedy under a federal statute is sufficient to invoke federal question jurisdiction. See Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15, 21 n.6, 102 S. Ct. 2202, 2206 n.6, 72 L. Ed. 2d 639 (1982). The statutory grant of jurisdiction under 28 U.S.C. § 1331 will support claims founded upon federal common law as well as those of a statutory origin. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 105 S. Ct. 2447, 2450, 85 L. Ed. 2d 818 (1985).

28 U.S.C. § 2409a does not provide an independent ground for jurisdiction in

this case. See, e.g., Spaeth v. United States Secretary of Interior, 757 F.2d 937, 942 (8th Cir. 1985).

II

GENERAL RULES OF LEGISLATIVE INTENT AS APPLIED TO INDIANS

The underlying rule is that congressional intent controls. DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975). In judicial construction "doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection in good faith." Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977). (Rosebud was a case involving congressional intent as to disestablishment of a part of the reservation.) In divining the legislative intent it is necessary to consider the

legislation in its historical context and not as if it were passed today. Ute Indian Tribe v. Utah, 716 F.2d 1298, 1303 (10th Cir. 1983).

A sale of allotted land in violation of federal law is void and confers no right upon the wrongdoer. Ewert v. Bluejacket, 259 U.S. 129, 42 S. Ct. 442, 66 L. Ed. 858 (1922). An allottee may not be barred by statute of limitations or laches from bringing suit to establish that title has been retained. Mottaz v. United States, 753 F.2d 71 (8th Cir.) rev'd on other grounds, 476 U.S. 834, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1985). Mottaz further held that Congress has not repudiated its policy of protecting Indian land by providing that claims against the United States for title to wrongful alienation allotments are barred by statute of limitations. Mottaz cited the

case of Haymond v. Scheer, 543 P.2d 541 (Okla. 1975).

In Haymond it was held that where an Indian holds legal title to lands with restriction against alienation, the title may be transferred only under rules and regulations prescribed by the Secretary of the Interior. Indian General Allotment Act, §§ 1-5, 25 U.S.C. §§ 331-348. Haymond was an action to quiet title to a railroad right of way which had been alienated without the consent of the government of the United States. It involved the conveyance of an easement of way for railroad purposes. Haymond held that a conveyance of allotted restricted lands made in violation of a federal statute authorizing the alienation of such lands is against public policy, absolutely void, and in no manner can any right, title, or interest in such land be

acquired under such conveyance. The Oklahoma Supreme Court cited Bailey v. Banister, 200 F.2d 683 (10th Cir. 1952); United States v. Gilbertson, 111 F.2d 978 (7th Cir. 1940); Heckman v. United States, 224 U.S. 413, 32 S. Ct. 424, 56 L. Ed. 820 (1912).

The General Allotment Act contemplates protection for the Indian beneficiaries along the lines afforded to the beneficiary of a spendthrift trust; trust property is simply not accessible to creditors, at least until after the trustee has delivered it, free of encumbrance, to the beneficiary. Keecni v. United States, 604 F. Supp. 267 (D.D.C. 1984).

Indian lands are governed solely by federal law and, where legal title to such land is held in trust by the United States, any attempted conveyance or

alienation must conform to the requirements of federal law. Nebraska Public Power Dist. v. 100.95 Acres of Land in Thurston County, 540 F. Supp. 592, aff'd in part, rev'd in part, 719 F.2d 956 (8th Cir. 1982). Accordingly, alienation of restricted Indian lands may only be accomplished pursuant to congressional authorization and according to rules and regulations prescribed by the Secretary of the Interior. Id.

III

TRUST STATUS OF INDIAN LANDS

The trust deed to Maurice A. Williams was authorized by the Indian Reorganization Act of 1934, 48 Stat. 984, codified at 25 U.S.C. §§ 461-479. The Indian Reorganization Act of 1934 (IRA) ended the previous federal policy of allotment. 25 U.S.C. § 461 provides that "On or after June 18, 1934, no land of any

Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian."

Although the practice of allotment of Indian lands ceased under the IRA, nonetheless federal law continued to provide that trust patents could be issued. 25 U.S.C. § 348. The United States held the land of Maurice Williams in such trust capacity under the trust patent deed dated September 23, 1969. The terms contained within the deed provided for a restriction against alienation for twenty-five years (expiring September 23, 1994).

One practical effect of property held by the United States in trust for Maurice A. Williams was that the land was exempt from state and local taxation. See, e.g.,

Leading Fire v. County of Gregory, 230 N.W.2d 114 (S.D. 1975); 25 U.S.C. § 465; Lebo v. Griffith, 42 S.D. 198, 173 N.W. 840 (S.D. 1919) (the state cannot tax Indian lands that are held in trust by the United States). The IRA sharply restricted the right to alienate allotments subject to it. Felix S. Cohen, Handbook of Federal Law 621 n.101 (1982).

IV

THE APPLICATION OF 25 U.S.C. § 483

25 U.S.C. § 483 provides:

§ 483. **Sale of land by individual Indian owners**

The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or **interests in lands** held by individual Indians under the provisions of sections [461 to 479 -- Indian Reorganization Act] of this title, or subchapter VIII of this chapter.

(Emphasis added.) Accordingly, if this embedded fossil was an "interest in land," then by the very terms of the statute the restriction against alienation could only be removed pursuant to the terms of the statute.

Under 25 U.S.C. § 483 Maurice Williams could not remove the restrictions against alienation contained in the trust patent, nor could he convey an interest in the land without the approval of the Secretary of the Interior. The Secretary of the Interior provided regulations to implement section 483. 25 C.F.R. Part 152--**Issuance of patents in fee, certificates of competence, removal of restrictions, and sale of certain Indian lands.**

It is undisputed that Williams did not make application to the Secretary of the Interior for a removal of the

restrictions contained in the trust deed, nor did he secure approval for sale of any interest in his land to plaintiffs. Failure to do so rendered the sale null and void. United States v. Walters, 17 F.2d 116 (D. Minn. 1926); Bailey v. Barrister, 200 F.2d 683 (10th Cir. 1952). Plaintiffs acquired no right to either ownership or possession of the fossil. If proper application had been made, the decision of the Secretary would be subject to judicial review as with any administrative decision. See also Felix S. Cohen, Handbook of Federal Law 167, 615, 623 (1982).

Plaintiffs urge the Court to find that this embedded fossil was neither "land nor an interest in land." Their position is that Maurice Williams was entitled to enter into a contract for its

excavation and removal from his trust land. The Court is unpersuaded.

25 C.F.R. provides in part:

§ 152.22 Secretarial approval necessary to convey individual-owned trust or restricted lands or land owned by a tribe.

(a) Individual lands. Trust or restricted lands, . . . or any interest therein, may not be conveyed without the approval of the Secretary. Moreover, inducing an Indian to execute an instrument purporting to convey any trust land or interest therein, or the offering of any such instrument for record, is prohibited and criminal penalties may be incurred. . . .

§ 152.23 Applications for sale, exchange or gift.

Applications for the sale, exchange or gift of trust or restricted land shall be filed in the form approved by the Secretary with the agency having immediate jurisdiction over the land. Applications maybe approved if, after careful examination of the circumstances in each case, the transaction appears to be clearly justified in the light of the long-range best interests of the owner or owners or as under conditions set out in § 152.25(d).

V

WAS THE FOSSIL AN INTEREST IN LAND?

The Court has found no case authority specifically holding that a paleontological fossil such as the fossil "Sue" embedded in the ground is an "interest in land."[6]

To address the issue of whether or not the fossil is personal or real property, the following definitions found in the South Dakota Codified Laws are helpful in the Court's analysis:

> **43-1-1. Property defined.** In this code, the thing of which there may be ownership is called property.
>
> **43-1-2. Classes of property.** Property is either:
>
> (1) Real or immovable; or

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[6]Plaintiffs assert that the fossil, upon severance, became personal property and thus not subject to the restriction against alienation. The Court believes such a position misses the point. The status of the fossil and the law applicable to it must be viewed before severance and not after severance.

(2) personal or movable.

43-1-3. Real and personal property distinguished. Real or immoVable property consists of:

(1) Land;

(2) That which is affixed to land;

(3) That which is incidental or appurtenant to land;

(4) That which is immovable by law.

Every kind of property that is not real is personal.

43-1-4. Land as solid material of earth. Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.

The Court finds that the embedded fossil was an interest in land as defined by these provisions and therefore subject to the requirements of 25 U.S.C. 483 and the Code of Federal Regulations.

VI

PROTECTION OF INDIANS

The Court's finding that the embedded fossil was "land or an interest in land"

and its removal subject to the rules and regulations of the Secretary of the Interior is consistent with the intent of Congress to protect Indian lands from improvident alienation. This fossil was described by witnesses in Black Hills II as a "priceless" paleontological find. The testimony at the evidentiary hearing in Black Hills II indicated that a "copy" of the fossil could be sold for $100,000 after it had been carefully preserved and curated (the process of preparing for viewing).

There are a number of statutes which indicate congressional intent to protect the Indians against acquisition of their land or interests in land. A non-exhaustive list of examples of statutes requiring approval of the Secretary of the Interior is as follows:

(1) The Secretary of the Interior is authorized to grant permission to the state or local authorities for the opening of public highways through allotted lands which have not been alienated. 25 U.S.C. § 311.

(2) Leases for farming and grazing purposes are subject to the approval of the superintendent or other officer in charge of the reservation under such rules and regulations as the Secretary may prescribe. 25 U.S.C. § 393.

(3) Allotted lands may be leased for mining purposes as may be advisable by the Secretary of the Interior under the rules and regulations. 25 U.S.C. § 396.

(4) The Secretary of the Interior may approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted. 25 U.S.C. § 396e.

(5) With respect to the general necessity to obtain consent to alienation, 25 U.S.C. § 392 provides as follows:

25 U.S.C. § 392. Consent to or approval of alienation of allotments by Secretary of Interior

> Whenever, in any law or treaty or in any patent issued to Indian allottees for lands in severalty pursuant to such law or treaty, there appears a provision to the effect that the lands so allotted cannot be alienated without the consent of the President of the United States, the Secretary of the Interior shall have full power and authority to consent to or approve of the alienation of such allotments, in whole or in part, in his discretion, by deed, will, lease, or any other form of conveyance, . . .

(6) Finally, with respect to the claim of a non-Indian about the right to property in which an Indian may be a party on one side, the burden of proof rests upon the non-Indian whenever the Indian shall make out a presumption of title from

the fact of previous possession or ownership. 25 U.S.C. § 194.

CONCLUSION

The Maurice Williams land is trust land, held by the United States in trust status. By the terms of the trust patent and the laws and regulations of the United States, an alienation by sale of an interest in land must be with the consent of the Secretary of the Interior. Maurice Williams did not make application for consent to the removal of the embedded fossil. BHIGR was equally responsible to insure that consent was obtained in compliance with federal law. Without such consent, the attempted sale of the fossil "Sue" embedded within the land is null and void. BHIGR obtained no legal right, title, or interest in the fossil as severed since the severance itself was contrary to the law. It would have been a

relatively simple matter to have applied for the removal of the alienation restraint. Had there been such an application and Secretarial approval, all these months of contention could have been avoided.[7] Plaintiffs must assume much of the fault caused by their failure to conform their conduct to the federal laws and regulations. Plaintiffs should have investigated the status of the land involved. They ran the risk of this unlawful taking of the fossil from Indian land by not having done so.

Judgment of dismissal of plaintiffs, complaint is entered contemporaneously with the filing of this memorandum opinion.

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[7]The United States and its representatives have been the subject of much public and private vilification for the action in reclaiming the possession of this fossil. The fact that the government was entitled to possession always seems to be overlooked.

Dated this 3d day of February, 1993.

BY THE COURT:

/s/
Richard H. Battey
UNITED STATES DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON. CLERK

By:/s/
Deputy Clerk

(SEAL)

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CIV. NO 92-5070

BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH; and BLACK HILLS MUSEUM OF NATURAL HISTORY FOUNDATION, INC., a nonprofit corporation,	)
Plaintiffs,	)
vs.	)
THE UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE,	)
Defendant.	)

ORDER DENYING MOTION FOR RECONSIDERATION

Plaintiffs have filed a motion and memorandum of law requesting this Court's reconsideration of its decision of February 3, 1993.

Plaintiffs' characterization of this Court's February 3, 1993, decision as holding that "the federal government owns all of the fossils on trust lands" is

incorrect. The Court held that the Tyrannosaurus rex fossil embedded in Maurice Williams, land is held by the United States under the rights set forth in the trust patent deed dated September 23, 1969. Any attempt by plaintiffs to extend this Court's decision beyond its clear holding is inaccurate. This Court's decision was clear and needs no clarification.

By reason of the frivolous nature of plaintiffs, motion, the government will not be required to respond under D.S.D. LR 7.2. Accordingly, plaintiffs' motion for reconsideration is denied.

Dated this 11th day of February, 1993.

BY THE COURT:

By: _____
RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

By: _____
Deputy Clerk

(SEAL)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1600

Black Hills Institute of Geological Research; Black Hills Museum of Natural History Foundation, Inc., a non-profit corporation,

Plaintiffs,

Joseph M. Butler,

Appellant,

v.

South Dakota School of Mines and Technology,

Appellee,

United States Department of Justice,

Defendant.

No. 93-1602

Black Hills Institute of Geological Research; Black Hills Museum of Natural History Foundation, Inc., a non-profit corporation,

Appellants,

v.

United States Department of Justice,

Appellee.

Appeals from the United States District Court for the District of South Dakota.

Submitted: October 11, 1993

Filed: December 15, 1993

Before JOHN R. GIBSON, MAGILL, and BEAM, Circuit Judges

MAGILL, Circuit Judge.

Black Hills Institute of Geological Research and Black Hills Museum of Natural

History Foundation (collectively, "Black Hills") appeal the district court's[1] judgment in favor of the United States. The district court found that the United States holds title to a valuable Tyrannosaurus rex skeleton ("the fossil" or "Sue") in trust for Maurice Williams ("Williams"), an individual Indian who is the beneficial owner of trust land on which Black Hills discovered the fossil. Joseph M. Butler appeals separately from the district court's order imposing Rule 11 sanctions on Butler for naming an improper party as a defendant. We affirm the district court's judgment that the United States holds trust title to the fossil and reverse its Rule 11 order.

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[1]The Honorable Richard H. Battey, United States District Judge for the District of South Dakota.

I. BACKGROUND

This case is before us for the third time. The factual background is uncomplicated. Black Hills collects and restores fossils for display in museums. In August 1990, Black Hills was excavating fossils in western South Dakota. Sue Hendrickson, a researcher working on the project, discovered Sue on Williams' ranch while on break. Since 1969, the United States has held this ranch land in trust for the sole use and benefit of Williams, an Indian. Two days after the discovery, Black Hills scientists began excavating Sue, the most complete and valuable Tyrannosaurus rex skeleton known to man, from Williams, land. At some point during the excavation, Black Hills purported to purchase from Williams the right to excavate Sue for $5000. After excavation, Black Hills moved the ten tons

of bones to Hill City, South Dakota, where scientists began the laborious process of restoring the fossil.

In May 1992, however, federal officers seized Sue and moved her to the South Dakota School of Mines and Technology ("School of Mines"). The United States attorney for South Dakota ordered the seizure on the ground that Black Hills, removal of Sue from Williams, land violated federal criminal statutes relating to federal lands. Black Hills then brought suit in district court to quiet title to Sue. In conjunction with this action, it sought a preliminary injunction for possession of the fossil pending the outcome of the suit. After the district court denied Black Hills a preliminary injunction, Black Hills moved under Eighth Circuit Rule 8A to this court

for an order granting it custody of Sue pending appeal of the injunction denial.

In Black Hills Institute of Geological Research v. United States Department of Justice, 967 F.2d 1237, 1241 (8th Cir. 1992) (Black Hills I), we found that the district court had anomalous jurisdiction over the temporary custody issue and remanded for a determination of the proper temporary custodian. The district court concluded that Sue should remain at the School of Mines pending disposition of the case on the merits. In Black Hills Institute of Geological Research v. United States Department of Justice, 978 F.2d 1043, 1045 (8th Cir. 1992) (Black Hills II), we affirmed the district court's custody order, dismissed with prejudice Black Hills' appeal of the preliminary injunction denial, and remanded the case for proceedings on the

merits. Meanwhile, Black Hills amended its complaint by abandoning the quiet title theory of its case and instead seeking only an order requiring the United States to return Sue to it.

On remand, the district court found that it still had to determine ownership of Sue despite Black Hills' amended complaint because "[a] permanent possessory right to the fossil is subsumed within the context of ownership." D. Ct. Mem. Op. at 6 (Feb. 3, 1993). It then concluded that it had federal question jurisdiction under 28 U.S.C. § 1331 because the case involved the application of federal statutes relating to Indian trust lands. Reaching the merits, the district court found that Sue was an interest in land under the trust land statutes. Because Williams failed to receive the Secretary of the Interior's

("the Secretary") approval for his attempted sale of Sue to Black Hills, the court reasoned, the transaction was void and the United States retained title to Sue in trust for Williams. Black Hills now appeals.

II. DISCUSSION

A. Subject Matter Jurisdiction

The first issue we must address is the district court's basis for subject matter jurisdiction over this case. We find that the district court had general federal question jurisdiction under 28 U.S.C. § 1331. Black Hills' complaint alleged facts sufficient to bring the case within 5 U.S.C. § 702's broad waiver of sovereign immunity. Section 702 waives the federal government's sovereign immunity in cases challenging agency action--here, the Department of Justice's seizure of Sue--and seeking relief other

than money damages.[2] See 5 U.S.C. § 702; Specter v. Garrett, 995 F.2d 404, 410 (3d Cir.) (holding that § 702's waiver of sovereign immunity is not limited to cases brought under the Administrative Procedure Act), cert. granted, 114 S. Ct. 342 (1993); Presbyterian Church v. United States, 870 F.2d 518, 525 (9th Cir. 1989) (holding that the term "agency action" "was clearly intended to cover the full spectrum of agency conduct"). District

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[2]Section 702 provides that its waiver of sovereign immunity does not apply " if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Under 28 U.S.C. § 2409(a), Congress waived the government's sovereign immunity in suits seeking to quiet title to real property. Section 2409(a), however, "does not apply to trust or restricted Indian lands." Id. Thus, § 2409(a) retains sovereign immunity for suits seeking to quiet title to Indian trust lands. Section 2409(a) does not "expressly or impliedly forbid[] the relief which is sought" here because Black Hills seeks the return of what is now person property, not a determination of title to trust lands.

courts have jurisdiction under § 1331 to hear cases falling within § 702's consent to suit. See Califano v. Sanders, 430 U.S. 99, 105 (1977) (holding that § 1331 confers jurisdiction on federal courts to review agency action "subject only to preclusion-of-review statutes created or retained by Congress").

B. Ownership of the Fossil

We now reach the merits of the case. We must first decide precisely what issue is before us. Initially, Black Hills sued the government to quiet title to Sue. Black Hills, second amended complaint abandoned the quiet title action and sought an order requiring the government to return the fossil. Black Hills argues that the district court erred because it determined ownership, an issue Black Hills claims that it did not raise in the second amended complaint. According to Black

Hills, the district court "only had jurisdiction to determine whether [Black Hills] or the Department of Justice was entitled to possession of the fossil." Appellant's Br. at 41.

In the second amended complaint, however, Black Hills stated that it "paid Williams $5000 in exchange for Sue. [Black Hills] scientists wrote a check to Williams on August 27, 1990, which he accepted and cashed in full payment for Sue." 2d Amended Compl., ¶ II, at 1. Thus, Black Hills alleged that it owned the fossil outright, not that it leased it or had some possessory interest that did not amount to full ownership. In light of this allegation, we can only construe its request that the district court order the "United States to return the fossil to [Black Hills]" as a claim for permanent possession of Sue. Id. at

5. Determining whether Black Hills is entitled to permanent possession necessarily requires determining which party actually owns the fossil. Thus, we must determine whether the transaction between Williams and Black Hills transferred title of Sue to Black Hills.

The ownership issue depends on our construction of several statutes governing Indian trust land. Sue Hendrickson discovered the fossil on land to which the United States holds legal title in trust for Williams, an individual Indian. Under the trust instrument, the United States will hold the land "in trust for the sole use and benefit of" Williams until the trust relationship expires on September 23, 1994. The United States acquired the land pursuant to the Indian Reorganization Act of 1934 ("the IRA"), see 25 U.S.C. § 465, and issued the trust patent to

Williams pursuant to a provision of the General Allotment Act of 1887 ("the GAA"), see 25 U.S.C. § 348.[3] Until the trust expires in 1994, Williams is a beneficial owner of the land, retaining certain judicially recognized rights but lacking the absolute right to dispose of the land as he pleases.

Other provisions of the IRA reflect the limits of Williams' interest in his trust land. Section four of the IRA, subject to several exceptions not relevant here, prohibits the "sale, devise,

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[3]The IRA ended the federal government's policy of allotting tribal land in severalty to individual Indians. See 25 U.S.C. § 461. Under 25 U.S.C. § 335, however, provisions of the GAA continue to apply "to all lands heretofore purchased or which may be purchased by authority of Congress for the use or benefit of nay individual Indian or band or tribe of Indians," "[u]nless otherwise specifically provided." The relevant GAA provision that applies here is 25 U.S.C. § 348, which governs the trust relationship between the government and the Individual Indian.

gift, exchange, or other transfer of restricted" Indian trust lands. Id. § 464 (codifying § 4 of the IRA). On application of Indian owners, however, the Secretary has discretion "to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under [the IRA]." Id. § 483; see also 25 C.F.R. § 152.22 (1993) (providing that "[t]rust or restricted lands . . . , or any interest therein, may not be conveyed without the approval of the Secretary"); id. § 152.23 (describing the application and approval process). These statutes and regulations establish a scheme by which beneficial owners of Indian land such as Williams may alienate all or part of their interest before their trust instruments expire. Outside of the permitted transactions not applicable

here, the only way such owners may alienate an interest in their trust land is by securing the prior approval of the Secretary. An attempted sale of an interest in Indian trust land in violation of this requirement is void and does not transfer title. See Mottaz v. United States, 753 F.2d 71, 74 (8th Cir. 1985), reversed on other grounds, 476 U.S. 834 (1986).

Here, Black Hills claims that it purchased the right to excavate Sue from Williams for $5000. Williams did not apply to the Secretary for prior approval of this transaction nor did the Secretary ever approve it. All parties agree that the fossil is now personal property because it has been severed from the land. In Starr v. Campbell, 208 U.S. 527, 534 (1908), however, the Supreme Court held that timber from Indian trust land that

the beneficial owner sold was subject to the trust patent's restraint on alienation even though the timber became personal property after the purchaser severed it from the land.[4]

Thus, the relevant inquiry for purposes of assessing the validity of the transaction is whether the fossil was

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[4]The Supreme court has held that a beneficial owner of Indian trust land could sell timber from his land without violating the restraint on alienation because "the cutting [wa]s incidental to the preparation of [the] land for agricultural uses." Felix S. Cohen, Handbook of Federal Indian Law, at 539, n.94 (1982 ed.) (citing United States v. Paine Lumber, 206 U.S. 467, 473-74 (1907)). The Court distinguished Paine, however, in Starr. In Starr, the Court found the timber subject to the restraint on alienation because the timber constituted 15/16 of the value of the land and the land was "timber land" unsuitable for farming. 208 U.S. at 534. Holding otherwise, the Court reasoned, would reduce the restraint on alienation to " small consequence." Id. Thus, Paine does not apply here because Sue was a valuable part of the land and nothing in the record suggests that she was excavated to clear the land for farming or other similar purposes.

personal property or land before Black Hills excavated it. If it was land within the meaning of the relevant statutes and regulations, the transaction between Williams and Black Hills is void and the United States holds Sue in trust for Williams because the trust continued in Sue when she became personalty. Cf. United States v. Brown, 8 F.2d 564, 566 (8th Cir. 1925) (explaining in the context of Indian trust land that "no change of form of property divests it of a trust[;] [a] substitute takes the nature of the original and stands charged with the same trust"), cert. denied, 270 U.S. 644 (1926).

Whether the fossil was "land" within the meaning of both 25 U.S.C. § 464 and 25 U.S.C. § 483 is a matter of federal law. Because Congress has provided no definition of "land" applicable to these

statutes, however, we may refer to state property law for guidance. See United States v. Certain Real Property at 2525 Leroy Lane, 910 F.2d 343, 349 (6th Cir. 1990) (discussing federal forfeiture statutes), cert. denied, 111 S. Ct. 1414 (1991); see also Wilson v. Omaha Indian Tribe, 442 U.S. 653, 676 (1979) (finding that state property law controlled title dispute between Indian and non-Indian claimants to land even though issue was ultimately one of federal law). South Dakota law denominates two classes of property: "[r]eal or immovable" property and "[p]ersonal or movable" property. S.D. Codified Laws Ann. § 43-1-2. "Real or immovable property consists of: (1) Land; (2) That which is affixed to land; (3) That which is incidental or appurtenant to land; (4) That which is immovable by law. Every kind of property

that is not real is personal." Id. § 43-1-3. "Land," in turn, "is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance." Id. § 43-1-4.

We hold that the fossil was "land" within the meaning of § 464 and § 483. Sue Hendrickson found the fossil embedded in the land. Under South Dakota law, the fossil was an "ingredient" comprising part of the "solid material of the earth." It was a component part of Williams, land, just like the soil, the rocks, and whatever other naturally-occurring materials make up the earth of the ranch. Black Hills makes several arguments to the contrary, none of which we find persuasive. That the fossil once was a dinosaur which walked on the surface of the earth and that part of the fossil was

protruding from the ground when Hendrickson discovered it are irrelevant. The salient point is that the fossil had for millions of years been an "ingredient" of the earth that the United States holds in trust for Williams. The case very well might be different had someone found the fossil elsewhere and buried it in Williams, land or somehow inadvertently left it there. Here, however, a Tyrannosaurus rex died some 65 million years ago on what is now Indian trust land and its fossilized remains gradually became incorporated into that land. Although it is movable, personal property now, at the time Hendrickson discovered the fossil it was part of Williams' land and thus is subject to § 464 and § 483. As in Starr, 208 U.S. at 534, where an Indian sold timber constituting 15/16 of the value of the land, we would render the

statutory restraint on alienation here essentially meaningless if Williams could transfer the right to excavate a priceless fossil derived from otherwise nondescript land without the Secretary's permission. Because he did not seek the Secretary's approval, we hold that Williams' attempted sale to Black Hills is void[5] and that the United States holds Sue in trust for Williams pursuant to the trust patent.

Black Hills argues, however, that the trust relationship between Williams and the United States does not govern the fossil. It claims that the government's trust duties over Williams, land are

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[5]There is an ongoing dispute between Williams and Black Hills regarding this transaction. We intimate no opinion as to the remedies Black Hills may have under state law as to its $5000 payment to Williams. Moreover, because Black Hills does not argue that it acquired anything less than title to Sue, we need not decide whether Williams could have lease Sue or transferred other rights to Black Hills.

limited to safeguarding the land base of the reservation through restricting alienation of the land and preserving the land's tax-exempt status. The government's seizure of the fossil, it asserts, exceeded the scope of the trust because no statutes regulate the management of fossils on Indian trust land and personal property such as the fossil is unrelated to the land base. Black Hills cites United States v. Mitchell, 445 U.S. 535 (1980) (Mitchell I), and United States v. Mitchell, 463 U.S. 206 (1983) (Mitchell II), for support.

In Mitchell I, individual Indians sued the United States for mismanaging timber resources on trust land of which they were the beneficial owners. The Supreme Court found that the GAA, the statute under which the Indians had received their beneficial interests in the

land, did not "impose any duty upon the Government to manage timber resources." 445 U.S. at 542. Rather, the GAA created only a "limited trust relationship" that sought "to prevent alienation of the land and to ensure that allottees would be immune from state taxation." Id. at 542, 544. In Mitchell II, however, the Court found that, even though the GAA was not a basis for liability, the United States could be liable for damages for mismanaging the timber because an elaborate statutory and regulatory scheme imposed fiduciary duties on the government relating to the management of timber resources on Indian trust land. 463 U.S. at 226. Mitchell I and Mitchell II, Black Hills claims, together compel the conclusion that the trust relationship between the government and Williams does not encompass the attempted sale of Sue

because the absence of a statutory scheme governing fossils means that the government has only limited trust duties where fossils are involved. The limited duty of preventing alienation of the land, it argues, does not include preventing sales of fossils.

We reject the Black Hills' argument that the Mitchell cases suggest that the government exceeded the scope of its trust relationship with Williams. First, the fiduciary duties of the government to beneficial owners of trust land, the issue that the Mitchell cases addressed, and the ability of beneficial owners to alienate trust land, the issue here, are different questions. Thus, that there are no statutes or regulations specifically governing the sale of fossils is not important. The absence of such regulation only suggests that the government could

not be liable in damages to Williams for breaching alleged fiduciary duties relating to the management of fossils on his land. It does not, however, affect the validity of Williams, attempted sale of the fossil to a third party because there are statutes and regulations governing the alienation of interests in Indian trust land, such as fossils. Moreover, the Court's holding in Mitchell I that the GAA imposed only limited trust duties on the government does not help Black Hills. Indeed, Congress enacted the GAA to prevent alienation of Indian trust land. 445 U.S. at 542. Because the fossil was part of Williams' trust land and he failed to secure approval for his attempted sale of the right to excavate it, we hold that the United States' seizure of the fossil was a proper exercise of its trust status under the

GAA.[6] Finally, nothing in either Mitchell case suggests that Congress intended that the goal of preventing alienation of the land not apply to interests in such land, like fossils, that become personal property when severed from the land.

Black Hills next argues in effect that holding Williams' sale invalid is bad policy. It asserts that Williams was competent to sell the fossil even if it was an interest in land and that finding the sale invalid would undermine the current legislative trend favoring tribal self-determination. These points are

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[6]The government seized the fossil pursuant to a search warrant as a part of a criminal investigation. Black Hills argues that the government cited violations of the Antiquities Act as one basis for the seizure knowing that the Act did not apply. We need not evaluate the government's articulated rationale for the seizure, however, because we conclude that the seizure was within the scope of the trust relationship with Williams.

matters of policy for Congress to consider, not federal courts. The current statutory scheme reflects Congress's desire to protect beneficial owners of Indian trust land like Williams regarding disposition of interests in such land. See 25 U.S.C. §§ 348, 464, 483; see also Tooahnippah v. Hickel, 397 U.S. 598, 609 (1970) (explaining that the GAA's legislative history "reflects the concern of the Government to protect Indians from improvident acts or exploitation by others"). Congress may very well determine that the historic practice of shielding beneficial owners from their own improvident decisions, unscrupulous offerors, and whatever other evils the enacting Congresses contemplated decades ago is no longer wise.[7] Until it does,

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[7]Congress has already eliminated many of the protections earlier statutes provided for Indians. Section 483 itself,

however, we are bound to apply the statutes and regulations forbidding such owners from alienating trust land without the Secretary's approval.

Black Hills and amici curiae the Libertarian Party of South Dakota and the National Libertarian Party make several other brief arguments. First, we reject amici's suggestion that we remand the case to the Secretary to consider nunc pro tunc approval of the sale. The statute provides that "application of the Indian owners" is a prerequisite to the Secretary's approval of conveyances of

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for instance, allows Indians to apply to the Secretary for removal of alienation restrictions. Thus, the statutes reflect the trend toward Indian self-determination. Although it has diminished the practice of protecting Indians, however, Congress has not completely eliminated it. Williams was free to request that the government end the trust or that he be allowed to alienate his land, but he did not. Because he did not, the vestiges of protection that remain still apply.

trust land. 25 U.S.C. § 483. The Secretary may not consider the transaction at issue here because Williams has never submitted an application. Moreover, we reject Black Hills' argument that the United States lacks standing to claim trust ownership of Sue because neither the Secretary nor Williams are parties. Williams is not a necessary party, see Heckman v. United States, 224 U.S. 413, 444 (1912), and the United States may claim trust title without the Secretary because the trust patent names it as trustee.

We also reject Black Hills' claim that the district court's decision violated its due process rights because the government seized the fossil without a pre-deprivation hearing and because Black Hills added value to Sue that it will be unable to recoup. Because we find that

Black Hills has no interest in Sue, we reject its claim that the lack of a pre-deprivation hearing violated its rights. Moreover, although it is unfortunate that Black Hills spent a great deal of time and resources adding value to a fossil it does not own, concluding that Black Hills' transaction with Williams is void does not deprive Black Hills of due process where it had no interest in the fossil and it could have taken any number of steps to protect itself in the first place. At the very least, for instance, that the fossil was embedded in land located within the boundaries of the Cheyenne River Sioux Indian Reservation Should have alerted Black Hills to the possibility that the federal government had some interest in Sue. Because it did not, however, we hold that the United States holds Sue in trust for Williams pursuant to the trust patent.

C. Rule 11 Sanctions

Counsel for Black Hills, Joseph Butler, challenges the district court's order imposing sanctions under Fed. R. Civ. P. 11[8] on him for naming the School of Mines as a defendant in the first amended complaint. The court awarded the School of Mines attorney's fees because it found that the school was not a proper defendant to Black Hills' quiet title action,[9] reasoning that the school had "no conceivable basis to assert any rights to the fossil" and "was nothing more than a mere depository of the fossil." D. Ct.

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[8]The amendments to Rule 11 that went into effect on December 1, 1993, do not affect our analysis.

[9]As we noted above, Black Hills' second amended complaint sought the return of Sue and abandoned the quiet title claim. At issue here is the district court's decision to sanction Butler for naming the School of Mines a defendant in the case when Black Hills was asking the court to quiet title.

Mem. Op. and Order at 3-4 (Sept. 8, 1992).

We review the district court's imposition of sanctions under Rule 11 for an abuse of discretion. Miller v. Bittner, 985 F.2d 935, 938 (8th Cir. 1993). The district court's task is to ascertain whether the attorney met the objective reasonableness standard. Id. (citations omitted). Improperly naming a party in a suit justifies Rule 11 sanction when "joining the party [is] baseless of lacking in plausibility." Community Elec. Serv of Los Angeles v. National Elec. Contractors Assoc., 869 F.2d 1235, 1245 (9th Cir.) (citing Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 (9th Cir. 1987)), cert. denied, 493 U.S. 891 (1989).

We find that Butler's decision to name the School of Mines as a defendant here was not baseless or lacking in

plausibility. Initially, Black Hills framed its case as a quiet title action. At the time Black Hills named it a defendant in the first amended complaint, the School of Mines was in possession of Sue. The district court, citing 75 C.J.S. Quieting Title § 54, found that the School of Mines had no "material subsisting interest" in Sue because it possessed her merely as an agent for the government and thus was not a proper party. D. Ct. Mem. Op. and Order at 3. The court's analysis of the merits of the School of Mines' status as a proper party would have been the correct inquiry on a motion to dismiss. It was not, however, the correct inquiry on a motion for Rule 11 sanctions.

Rather, as Community Electric Service suggests, the focus in the Rule 11 context should be on the plausibility of including the School of Mines as a party at the

complaint stage. We think that the School of Mines, possession of Sue, albeit as a "depository" for the government, gave Black Hills a plausible argument that the School of Mines had a sufficient interest in the property to be named as a defendant in a quiet title action. Indeed, the district court itself noted that "in some circumstances possession of the object in dispute may be enough to justify suing the possessor in a quiet title action." Id. Case law on this issue is sparse and we will not force Butler to bear the burden of Rule 11 sanctions where it is unclear precisely in what "circumstances" possession is enough to sue the possessor. Cf. Mareno v. Rowe, 910 F.2d 1043, 1047 (2d Cir. 1990) (reversing award of Rule 11 sanctions where plaintiff's claim, although ultimately unsuccessful, involved "the complexities of New York long arm

jurisprudence"), cert. denied, 498 U.S. 1028 (1991). Butler had a plausible claim that the School of Mines, possession gave it the "material subsisting interest" in Sue needed to render it a proper party in the case.

Moreover, regardless of whether the School of Mines asserted an ownership interest in Sue, the fact remains that it retained possession of her. There is ample authority for the proposition that the court in a quiet title action, in order to afford complete relief, may order that a defendant relinquish possession of the subject property to the plaintiff. See 74 C.J.S. Quieting Title §§ 96, 108 (1951). Thus, naming the School of Mines as a defendant here was not baseless because the school clearly had an interest in Sue--possession--that a quiet title action could affect; failure to include

the School of Mines might have required Black Hills to bring an entirely different action to enforce its right to possession if the court found that it had such a right. Once the School of Mines represented in open court that it would abide by any order the district court made and would not assert any separate interest in Sue, counsel for Black Hills immediately assented to dismissal of the school from the case. See Status Conference Tr. at 16. Thus, we hold that the district court abused its discretion in imposing Rule 11 sanctions on Butler. Although naming the School of Mines as a defendant in the first amended complaint ultimately proved to be unnecessary, Butler acted reasonably under the existing facts and law.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court that the United States holds Sue in trust for Williams pursuant to the trust patent, and we reverse the district court's order imposing Rule 11 sanctions on Joseph Butler.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1602SDRC

Black Hills Institute of Geological Research; Black Hills Museum of National (sic) History Foundation, Inc., a non-profit Corporation,

Appellants,

vs.

United States Department of Justice,

Appellee.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied.

The petition for rehearing by the panel is also denied with the following explanation. In its petition for rehearing, Black Hills Institute of Geological Research (Black Hills) relies on United States v. Good, 62 U.S.L.W. 4013 (U.S. Dec. 14, 1993), for the claim that

it was entitled to an adversary hearing before the Department of Justice seized the fossil "Sue" from it. In Good, it was undisputed that Good owned the real property that the government had seized without first providing Good with an adversary hearing. See id. at 4014-15. This fact distinguishes Good from the instant case, where the panel determined that Black Hills did not own the property in question. See Black Hills Inst. of Geological Research v. United States Dep't of Justice, No. 93-1602, slip op. at 9-10 (8th Cir. Dec. 15, 1993).

February 2, 1994

Order Entered at the Direction of the Court:

Michael S. Gans

Clerk U.S. Court of Appeals Eighth Circuit

Supreme Court, U.S.
FILED
JUL 6 1994
OFFICE OF THE CLERK

No. 93-1829

In the Supreme Court of the United States

OCTOBER TERM, 1994

BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the sale of a fossilized Tyrannosaurus rex skeleton by an Indian to petitioners was legally void because the fossil was discovered in land held in trust by the United States for the Indian and the United States did not approve the transaction.

2. Whether the seizure of the fossil from petitioners by federal agents without prior notice or opportunity for a hearing violated due process.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1825

BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 85-121) is reported at 12 F.3d 737. The court of appeals' order denying rehearing (Pet. App. 122-123) is reported at 12 F.3d 746. The opinion of the district court (Pet. App. 52-81) is reported at 812 F. Supp. 1015. The district court's order denying a motion for reconsideration (Pet. App. 82-84) is unreported. Two prior opinions of the court of appeals are reported at 978 F.2d 1043 and 967 F.2d 1237.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1993, and a timely petition for rehearing was denied on February 2, 1994. Pet. App. 122-123. The

petition for a writ of certiorari was filed on May 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under a patent deed dated September 23, 1969, the United States holds in trust almost 2,000 acres of ranch land within the Cheyenne River Sioux Tribe Reservation in South Dakota for the sole use and benefit of Maurice A. Williams (Williams), an individual Indian of that Tribe. The trust instrument provides that the United States "will hold the land * * * (*subject to all statutory provisions and restrictions*) for the period of twenty-five years, in trust for the sole use and benefit of [Williams], and at the expiration of said period the United States will convey the same by patent to [Williams] in fee" (emphasis added).[1] The land was placed into trust pursuant to the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.* Pet. App. 53-57, 96-97.

2. "An essential characteristic of most Indian allotments is a federally imposed restraint against alienation." F. Cohen, *Handbook of Federal Indian Law* 618 (1982). The Indian Reorganization Act provides that, with certain exceptions, "no sale, devise, gift, exchange, or other transfer of restricted Indian lands * * * shall be made or approved." 25 U.S.C. 464. The Act of June 25, 1910, ch. 431, § 5, 36 Stat. 857, makes it a criminal offense "to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian." 25 U.S.C. 202.

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[1] The trust relationship expires on September 23, 1994.

Consistent with these statutory provisions, it is well established that a sale of an interest in Indian trust land contrary to federal restrictions on alienation is void. See, *e.g.*, *Heckman* v. *United States*, 224 U.S. 413, 438 (1912). Trust land may be alienated, however, if the government approves the transaction. The Act of May 14, 1948, ch. 293, 62 Stat. 236, vests the Secretary of the Interior with discretionary authority to approve applications "to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands" held in trust for Indians. 25 U.S.C. 483. See also 25 C.F.R. 152.22(a) ("Trust or restricted lands, * * * or any interest therein, may not be conveyed without the approval of the Secretary.").[2]

3. In August 1990, Sue Hendrickson, a researcher with petitioner Black Hills Institute of Geological Research, discovered a fossilized skeleton of a Tyrannosaurus rex on the land held in trust for Williams.[3] Soon thereafter, Black Hills Institute began to excavate the fossil. Petitioners claim that on August 27, 1990, Black Hills Institute paid Williams $5,000 in exchange for the fossil. Williams did not apply to the Secretary for approval of that transaction, nor did the Secretary approve it. When the excavation of the fossil was complete, Black Hills Institute moved the fossil to Hill City, South Dakota, and assigned its rights in the fossil to petitioner Black Hills Museum of Natural History

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[2] The regulation quoted in the text also specifically warns that "inducing an Indian to execute an instrument purporting to convey any trust land or interest therein * * * is prohibited and criminal penalties may be incurred. (See 25 U.S.C. 202 and 348)." 25 C.F.R. 152.22(a).

[3] The fossilized remains of the Tyrannosaurus rex are approximately 65 million years old and weigh ten tons. The dinosaur has been nicknamed "Sue" after its discoverer. Pet. App. 53, 88-89.

Foundation. In May 1992, federal agents, acting pursuant to a warrant, seized the fossil and moved it to the South Dakota School of Mines and Technology, where it remains today. The seizure was ordered by the United States Attorney for the District of South Dakota, who then believed that the excavation and removal of the fossil may have violated the Antiquities Act of 1906, 16 U.S.C. 431-433, and other federal statutes. Pet. 1; Pet. App. 53-54, 57-58, 88-89, 95-96, 99; see also 967 F.2d at 1238-1239.

4. Following seizure of the fossil, petitioners filed suit in the United States District Court for the District of South Dakota, requesting (in their second amended complaint) that the court enter an order requiring the United States to return the fossil to their permanent possession. Pet. App. 59-62.[4] On cross-motions for summary judgment, the district court held that, because the fossil was part of the land held in trust for Williams, and because the Secretary did not approve the sale, petitioners "obtained no legal right, title, or interest in the fossil." *Id.* at 79. Accordingly, the district court concluded that "the government was entitled to possession [of the fossil]," *id.* at 80 n.7, and it entered judgment against petitioners, *id.* at 80. The district court also denied petitioners' motion for reconsideration, *id.* at 82-84, which it characterized as "frivolous," *id.* at 83.

5. The court of appeals affirmed. Pet. App. 85-121. The court reasoned that, to determine whether petitioners should be given possession of the Tyrannosaurus rex, it would be necessary to decide who actually owns

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[4] Petitioners unsuccessfully sought a preliminary injunction requiring return of the fossil pending the outcome of the litigation. Pet. App. 89-90; see 978 F.2d 1043; 967 F.2d 1237.

the fossil. *Id.* at 94-96. On that issue, the court ruled, first, that the fossil was discovered on land held in trust for Williams by the United States, and second, that under governing federal laws and regulations, Williams could not alienate an interest in the land without the approval of the Secretary. *Id.* at 96-99. Thus, the key question, in the court's view, was whether the fossil constituted "land," within the meaning of those laws and regulations, at the time it was excavated. *Id.* at 100-101. The court reasoned that, although that question was ultimately one of federal law, it was appropriate to refer to state-law property concepts. *Id.* at 101-102. Because under South Dakota law, "land" is defined as the "the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance," S.D. Codified Laws Ann. § 43-1-4 (1983), the court held that the fossil was "land" within the meaning of 25 U.S.C. 464 and 483. Pet. App. 102-103. The court explained:

> Sue Hendrickson found the fossil embedded in the land. Under South Dakota law, the fossil was an "ingredient" comprising part of the "solid material of the earth." It was a component part of Williams' land, just like the soil, the rocks, and whatever other naturally-occurring materials make up the earth of the ranch.

Id. at 103. The court therefore concluded that "[b]ecause he did not seek the Secretary's approval, * * * Williams' attempted sale to [petitioners] is void and * * * the United States holds Sue [the fossil] in trust for Williams

pursuant to the trust patent." *Id.* at 105 (footnote omitted).[5]

The court of appeals also rejected petitioners' claim that they had been deprived of due process because the government seized the fossil without first affording them notice and an opportunity for a hearing. "Because we find that [petitioners] ha[ve] no interest in Sue," the court reasoned, "we reject [their] claim that the lack of a pre-deprivation hearing violated [their] rights." Pet. App. 113-114. Citing *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), petitioners renewed their due process argument in a petition for rehearing. The court denied rehearing, distinguishing *James Daniel Good* on the ground that "it was undisputed that Good owned the real property that the government had seized without first providing Good with an adversary hearing," whereas in this case "the panel determined that [petitioners] did not own the property in question." Pet. App. 122-123.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court. The courts below merely applied a settled rule of Indian law—that the sale of an interest in Indian land held in trust by the United States without the permission of the government is void—in a specific factual context. Moreover, petitioners' due process claim furnishes no basis for them to recover the fossil. Accordingly, further review is unwarranted.

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[5] The court rejected the contention that, after its excavation, the fossil became an alienable form of personal property under *United States* v. *Paine Lumber Co.*, 206 U.S. 467 (1907). The court instead followed *Starr* v. *Campbell*, 208 U.S. 527 (1908), which had distinguished *Paine Lumber*. Pet. App. 99-100 & n.4.

1. Petitioners argue (Pet. 40-48) that the court of appeals' holding that the fossil could not be sold without the government's approval is contrary to *United States* v. *Paine Lumber Co.*, 206 U.S. 467 (1907). That contention is meritless.[6] In *Paine Lumber*, Indians cut and sold timber from restricted land without government approval, and the United States sued to recover the value of the timber. The Court held that, even though the Indians could not alienate the land, the sale of the timber was valid. Writing for the Court, Justice McKenna emphasized that the land was allotted to the Indians with the intent that it be used as farm land, and hence that removal of the timber actually improved the suitability of the land for its intended use. See *id.* at 473-474. The meaning of *Paine Lumber* was clarified one year later in *Starr* v. *Campbell*, 208 U.S. 527 (1908), in which the Court held that a sale of timber cut from Indian trust land was void. Justice McKenna, writing for the Court once again, distinguished his own opinion in *Paine Lumber* on the ground that there "the land granted was

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[6] Petitioners do not expressly challenge the court's related holding that the fossil was "land" for purposes of the federal laws barring alienation of trust lands. That holding was in any event correct. A fossil is analogous to other naturally occurring resources constitutive of land. Cf. *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938) ("Minerals and standing timber are constituent elements of the land itself."). A fossil is not the actual remains of a plant or animal that perished long ago. Rather, "[f]ossils are generally formed when animals or plants die and are buried in sediment before they can decompose. The skeletal structure or remaining impressions are gradually replaced by minerals in the same form as [the living] animal or plant." Lazerwitz, *Bones of Contention: The Regulation of Paleontological Resources on the Federal Public Lands*, 69 Ind. L.J. 601, 604 n.11 (1994), citing R. Fortey, *Fossils: the Key to the Past* 9 (1991). Fossils, then, are no less "land" than other minerals deposits.

arable, and could be of no use until the timber was cut," whereas in *Starr* v. *Campbell*, the land at issue was "all timber land" and the timber constituted 15/16 of the land's value. 208 U.S. at 534. "The restraint upon alienation would be reduced to small consequence," the Court concluded, were the timber "left to the unrestrained or unqualified disposition of the Indian." *Ibid.*

This case is much closer to *Starr* v. *Campbell* than it is to *Paine Lumber*. Unlike *Paine Lumber*, excavation of the fossil was not necessary for Williams' land to be of productive use, and it certainly did not increase the land's value. And like the timber in *Starr* v. *Campbell*, the fossil was a highly valuable part of the land and hence falls squarely within the policies of the statutory restrictions on alienation.[7] Accordingly, the court of appeals correctly concluded that *Starr* v. *Campbell* rather than *Paine Lumber* is the more relevant precedent. Pet. App. 99-100 & n.4, 104-105.[8]

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[7] Strangely enough, petitioners dispute that the fossil is valuable. Pet. 46. The record, however, establishes that this exceedingly rare paleontological find is extremely valuable. One witness in a prior proceeding described the fossil as "priceless," and there was other evidence that reproductions of the fossilized skeleton, following its restoration, could be sold for $100,000 each. Pet. App. 76. By at least one estimate, the Tyrannosaurus may be worth several million dollars. See Villarreal & Zacharakis, *"Where Did You Dig Up That Old Fossil?": Will Universities Own the Research Specimens that They Collect or Purchase?*, 20 J.C. & U.L. 225, 228 (1993).

[8] After arguing that the decision below is contrary to *Paine Lumber*, petitioners assert that "[f]ossils are fundamentally different from timber" because (1) a significant investment of time and money is necessary to make them valuable, and (2) a fossil exposed to the elements will lose its (potential) value if it is not excavated promptly. Pet. 47. Those observations do not justify a "fossil exception" to the rule that trust land is inalienable. First,

Petitioners also argue that, because Williams assertedly placed his land in the trust of the United States solely to avoid state taxation, restricting his ability to sell the fossil "does nothing to further the objective" of the trust. Pet. 43. That argument, however, is wide of the mark. The patent deed creating the trust provides that Williams' land is "subject to all statutory provisions and restrictions" during the trust period. Pet. App. 55. Therefore, whatever Williams' motives might have been, the full force of the federal laws and regulations governing the alienability of Indian trust land applies to his property.

2. Relying heavily upon *United States* v. *James Daniel Good Real Property*, *supra*, petitioners also claim (Pet. 11-29) that the seizure of the fossil deprived them of property without due process because the seizure was not preceded by notice or an opportunity for a hearing. The court of appeals, which specifically considered *James Daniel Good*, rejected petitioners' claim on the view that, because the fossil never belonged to petitioners in the first place, they had no property right subject to due process safeguards. Pet. App. 122-123; see also *id.* at 113-114.

At the outset, it is far from clear that the analysis of, or the conclusion reached in, *James Daniel Good* applies in this case. *James Daniel Good* was a civil action in which the government sought forfeiture of a house. This Court, applying the three-part test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), held that the owner of the

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other natural resources appurtenant to land, such as timber and minerals, also require an initial investment before they may be profitably sold. Second, inasmuch as the fossil "Sue" was in the earth for 65 million years, petitioners cannot seriously contend that its excavation was demanded by exigent circumstances.

house was entitled to predeprivation notice and hearing. See *James Daniel Good*, 114 S. Ct. at 501-504. In so doing, the Court distinguished *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), in which it had found no right to preseizure notice and hearing, on the ground that *Calero-Toledo* involved moveable personal property (a yacht), not real property. See *James Daniel Good*, 114 S. Ct. at 500. Here, the fossil was seized during a criminal investigation, at a time when it had already been severed from the land. Because the pieces of the fossil are moveable, and because *Mathews* v. *Eldridge*, *supra*, has little if any application in the criminal context, see *Medina* v. *California*, 112 S. Ct. 2572, 2576 (1992), what the Due Process Clause requires in this case may well be quite different than what it required in *James Daniel Good*. Cf. *James Daniel Good*, 114 S. Ct. at 505 n.3 ("We do not address what sort of procedures are required for preforfeiture seizures of real property in the context of criminal forfeiture.").

Even if we assume *arguendo*, however, that petitioners were entitled under *James Daniel Good* to predeprivation notice and an opportunity for a hearing, petitioners still would not be entitled to the relief they request—*i.e.*, the return of the fossil. It has been determined in this very litigation that petitioners do not own, and have no right to possess, the fossil. Indeed, since the transaction in which petitioners sought to purchase the fossil was void *ab initio*, in the eyes of the law they have never owned the fossil, even prior to the allegedly unconstitutional seizure. Because petitioners' due process claim, even if meritorious, would not call into question the court of appeals' resolution of the underlying ownership issue, it cannot provide a basis for awarding them permanent possession of the fossil. See *United States* v. *Property at 4492 South Livonia Road*,

889 F.2d 1258, 1265 (2d Cir. 1989) ("Various circuit courts have held that the illegal seizure of property, standing alone, will not immunize that property from forfeiture, so long as impermissibly obtained evidence is not used in the forfeiture proceeding."). This view, moreover, is consistent with the view expressed by the court of appeals in *James Daniel Good* itself. See *United States* v. *James Daniel Good Property*, 971 F.2d 1376, 1384 (9th Cir. 1992) ("If on remand the district court finds the filing of this proceeding to be timely, the violation of Good's due process rights need not invalidate the forfeiture. * * * Good is, however, entitled to the rents accrued during the illegal seizure of his home."), aff'd in part and rev'd in part, 114 S. Ct. 492 (1993).[9]

It is a general rule of constitutional law that "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Here, even if petitioners should have been given notice and an opportunity for a hearing before seizure of the fossil, returning the fossil to them on a permanent basis would bear no relation to the injury they suffered. At the same time, that "remedy" would obviously affect the interests of Williams, as the beneficial owner of the land from which the fossil was excavated, and the United States, as trustee thereof.[10]

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[9] This Court did not address the remedies issue in *James Daniel Good*.

[10] Petitioners seek only equitable relief requiring that the fossil be returned to their possession. Pet. App. 60, 91. They have not sought damages for an alleged due process violation based on the failure to afford them predeprivation notice and an opportunity for a hearing. Cf. *Carey* v. *Piphus*, 435 U.S. 247, 266-267 (1978) (only nominal damages available in suit under 42 U.S.C. 1983 for

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1994

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due process violation when governmental action was justified on the merits); but cf. *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976) (no waiver of sovereign immunity under Tucker Act for due process violation).

Supreme Court, U.S.
FILED
JUL 18 1994
OFFICE OF THE CLERK

(3)

No. 93-1825

IN THE SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1993

BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH and BLACK HILLS MUSEUM OF NATURAL HISTORY FOUNDATION, INC.,

PETITIONERS

vs.

THE UNITED STATES OF AMERICA DEPARTMENT OF JUSTICE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT

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A. **Fossils Are Not Locatable Minerals.**

The government suggests that fossils "are no less 'land' than other mineral deposits." This comment, perhaps more than any other statement found in any document in this action, illustrates just how wide of the mark the government's understanding is of this matter.

A 1986 Memorandum to the Director of the Bureau of Land Management discusses at length the error in characterizing fossils as minerals. The author notes:

> A fossil is currently defined to be: 'any remains, impression, or trace of an animal or plant of past geologic ages that have been preserved in the earth's crust. Thrush, A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior, Bureau of Mines (1968). The Department first ruled that fossils are not locatable as a 'valuable mineral' under the Mining Law of 1872, 30 U.S.C. § 22 et seq., in the early case of Earl Douglass, 44 L.D. 325, rehearing denied, 44 L.D. 326 (1915).

Moreover, the Memorandum also notes that the Douglass decision has stood for over 70 years and is widely recognized as the Department's position on the locatability of fossils under the Mining Law. See United States v. Bolinder, 83 I.D. 609, 28 IBLA 187 (1976); 1 American Law of Mining, § 8.01 [3] (2d ed. 1984); Reeves, The Meaning of the Word "Minerals," 54 N. Dakota L. Rev. 419, 476 (1978). It makes no sense for the United States to abandon this long held characterization of fossils and now suggest that "[f]ossils, then, are no less 'land' than other mineral deposits.

Likewise, the government's bold assertion that fossils are "analogous to other naturally occurring resources constitutive of land" also falls wide of the mark. This Court's decision in Watt v. Western Nuclear, Inc., 462 U.S. 36

(1983) provides guidance on this point. This Court recognized that:

> 'the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom,' and if all lands were considered 'minerals,' 'the owner of the surface estate would be left with nothing."

462 U.S. at 43 (quoting Northern Pacific R. Co. v. Soderberg, 188 U.S. 526, 530 (1903)). Such a broad view of what is included in a mineral reservation, which would clearly include fossils, was rejected by this Court. Id. Rather, this Court stated that for a substance to be a reserved mineral "it must not only be a mineral within one of the more familiar definitions of that term . . . but also the type of mineral that Congress intended to reserve to the United States." Id.

The Institute has contended that the fossil in this case was unregulated

personal property which Maurice Williams was free to sell to whomever he chose. If that were not the case, then the labyrinth of regulations governing minerals and timber, as well as oil and gas on Indian reservations would be superfluous. The government's characterization of the fossil as a mineral only serves to illustrate the correctness of the Institute's analysis.

B. The Institute Enjoys a Constitutionally Protected Interest in the Fossil.

It is surprising that the Solicitor General would put his imprimatur on the way in which the government has seized this fossil. Instead of affording the Institute the same process due murderers, rapists, and drug dealers, the government blithely condones forfeiture by search warrant.

It is, however, clear that the Institute has constitutionally protected rights in the fossil. First of all, the Institute had a possessory interest in the fossil. If the government can permanently deprive the Institute of its possessory interest in the fossil by merely issuing a search warrant, then no American can be assured of his or her right to retain possession of their personal property if the government chooses to seize it.

The Institute has other interests in the fossil. One such interest was the interest in preserving the fossil and studying it. The Eighth Circuit concluded that such an interest was sufficient to support the Institute's claim for return of the fossil based on the federal court's "anomalous jurisdiction." Black Hills Institute of Geological Research v. United

States, 967 F.2d 1237, 1240 (8th Cir. 1992).

The Institute was also deprived of the same rights deprived of the Petitioner in United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993). Those interests include the "valuable rights of ownership, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents. All that the seizure left him, by the Government's own admission, was the right to bring a claim for the return of title at some unscheduled future hearing." Id. The Institute's rights, on the other hand, were limited to an action under Fed. R. Crim. P. 41(e) and the underlying action based on anomalous jurisdiction. Neither action is a satisfactory substitute for a pre-deprivation hearing.

The Institute has yet another interest in the fossil. That interest includes the right to assert a possessory lien for the value of the services the Institute has thus far rendered in restoring the fossil. Uncontradicted evidence shows that the Institute has devoted more than 5,000 hours to restoring the fossil and has spent over $100,000 in the process. The way in which the government seized the fossil has deprived the Institute of its right to assert a possessory lien.

CONCLUSION

For all of the reasons discussed in the Institute's Petition, as well as for those additional reasons discussed in this Reply, the Institute prays that the Court grant a Writ of Certiorari and hear the Institute's claim on its merits.

Dated this 19th day of July, 1994.

BANGS, McCULLEN, BUTLER,
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